

STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONAL WINE & SPIRITS, INC.,
NWS MICHIGAN, INC., and
NATIONAL WINE & SPIRITS, L.L.C.,

Supreme Court No. 126121

Plaintiff-Appellants

Court of Appeals
No. 243524

v

STATE OF MICHIGAN,

Circuit Court for the County of
Ingham No. 02-13-CZ

Defendant-Appellee

and

MICHIGAN BEER & WINE
WHOLESALE ASSOCIATION,

Intervening Defendant-Appellee.

MILLER, CANFIELD, PADDOCK
and STONE, P.L.C.

Louis B. Reinwasser (P37757)
Attorneys for Plaintiff/Appellants
One Michigan Avenue, Suite 900
Lansing, MI 48933-1609
(517) 487-2070

WILLINGHAM & COTE, P.C.

Anthony S. Kogut (P31697)
Attorneys for Intervening
Defendant/Appellee
333 Albert Avenue, Suite 500
East Lansing, MI 48823-4394
(517) 351-6200

MICHAEL A. COX
ATTORNEY GENERAL
Howard E. Goldberg (P14095)
Assistant Attorney General
Attorneys for Defendant/Appellee
(248) 888-8800

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**APPELLANTS' REPLY BRIEF IN SUPPORT
OF APPLICATION FOR LEAVE TO APPEAL**

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ARGUMENT

I. THIS APPEAL INVOLVES A SUBSTANTIAL QUESTION AS TO THE VALIDITY OF A LEGISLATIVE ACT, HAS SIGNIFICANT PUBLIC INTEREST, AND INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE

The briefs of Defendant/Appellees State of Michigan and Michigan Beer & Wine Wholesalers Association ("Defendants") make a strong case for why this Court should grant leave to appeal in this matter. As noted by both Defendants, the United States Supreme Court has agreed to resolve a dispute among the United States Circuit Courts of Appeal concerning the issue of the relative weight to be given to the Commerce Clause and the Twenty-first Amendment in cases involving interstate commerce and state regulation of alcoholic beverages. To this end, the United States Supreme Court has granted cert in the cases of *Heald v Engler*, 342 F3d 517 (CA 6, 2003), and *Swedenburg v Kelly*, 358 F3d 223 (CA 2, 2004). In *Heald*, the Sixth Circuit case, the court followed the weight of authority and ruled that where there is discrimination against interstate commerce, the court must employ a strict scrutiny inquiry to determine whether there were less discriminatory alternatives to accomplish the interest promoted by the State, even where alcoholic beverage regulation was concerned. In *Swedenburg*, the Second Circuit took the position that the Twenty-first Amendment takes precedence over the Commerce Clause. Although Plaintiff/Appellants ("Plaintiffs") believe *Heald* is the correct analysis while *Swedenburg* is faulty, it is undeniable that this clash of ideas is what led the United States Supreme Court to grant cert in both of these cases.

In light of the fact that both of the Defendants rely heavily on the same arguments made in *Swedenburg*, it is difficult to understand how they could assert to this Court that Appellants have not "adequately shown that the issue involves a substantial question as to the validity of a

legislative act, that the issue has significant public interest, or that the issue involves legal principles of major significance to the state's jurisprudence." State's Brief, p vii. The United States Supreme Court would certainly disagree. If nothing else, this Court should grant leave to appeal to ensure that the ruling in this case is ultimately consistent with whatever the United States Supreme Court determines when it resolves the conflict among the circuits.

II. **THE LOWER COURTS SHOULD HAVE AT LEAST REQUIRED DEFENDANTS TO PRESENT PROOFS TO SUPPORT THEIR ALLEGATIONS CONCERNING THE STATE INTERESTS SUPPOSEDLY FURTHERED BY §205(3)**

The trial court and the Court of Appeals erred when they did not even require an evidentiary hearing to determine whether the interests asserted by the Defendants were in fact the interests that the Legislature sought to further when it adopted § 205(3) (MCL 436.205(3)), or whether the scheme mandated by § 205(3) was either necessary or effective in furthering those interests. Despite affidavits and arguments submitted by Plaintiffs that disputed whether this was the actual interest the State sought to promote, and that raised serious questions regarding the effectiveness of § 205(3) to further the stated interest, the courts below accepted as fact the allegations made by Defendants. This is particularly disturbing as it is preposterous to think that the State really intended to hamper the ability of one of its handpicked ADAs by making it difficult or even impossible for it to compete with the other two ADAs (Transcon and General) that the State has licensed to distribute liquor.

At any rate and as argued at length in the Application for Leave to Appeal, the court in *Heald* made it clear that when a statute discriminates against interstate commerce, the court *must* conduct a strict scrutiny inquiry to determine whether the asserted state interest was legitimate, whether the legislation in question furthered that state interest, and finally, whether

there were less discriminatory alternatives that would protect the state interests. The requirement of such an inquiry was confirmed by the United States Supreme Court in the case of *Baldwin v GAF Seelig, Inc*, 294 US 511, 524; 55 S Ct 497, 79 LEd 1032 (1935) ("There is neither evidence nor presumption that the same minimum prices established by order of the board for producers in New York are necessary also for producers in Vermont. *But apart from such defects of proof*, the evils springing from uncared for cattle must be remedied by measures of repression more direct and certain than the creation of a parody of prices between New York and other states.")(emphasis added). At the very least, Plaintiffs have raised a genuine issue of fact with regard to all of these questions, making summary disposition in favor of Defendants entirely inappropriate.¹

III. THE MICHIGAN LIQUOR CODE DOES ON ITS FACE DISCRIMINATE AGAINST INTERSTATE COMMERCE

Defendants point out in their briefs that the lower courts determined that § 205(3) does not discriminate against interstate commerce. To the extent this was the determination of these courts, it is clear error. It is difficult to follow the reasoning of the Defendants in this regard, but essentially they argue that § 205(3) does not discriminate against out-of-state companies because it applies equally to any company, including in-state companies, seeking to become an ADA/wine wholesaler after September 24, 1996. According to Defendants, it is just an unfortunate circumstance that no out-of-state companies such as Plaintiffs were wine wholesalers on September 24, 1996, but the fact that they could have at some point prior to this

¹ On the other hand, given that the Michigan Liquor Code discriminates on its face against out-of-state companies, summary disposition in favor of Plaintiffs is warranted.

date obtained a wholesaler's license eviscerates any charge that § 205(3) discriminates against out-of-state companies.

This argument is specious. The mere fact that § 205(3) might treat in-state and out-of-state companies the same *in the future* does not alleviate the discrimination it effects with regard to companies that received the significant benefits conferred by § 205(3) on the date it was passed.² In this case, all of those companies were, as a matter of law, Michigan residents because of the effect of MCL 436.601 (§ 601).³

This case finds a perfect analogue in the case of *C&A Carbone, Inc v Town of Clarkston, NY*, 511 US 383; 114 S Ct 1677; 128 L Ed 2d 399 (1994). In *Carbone*, the Court ruled unconstitutional a local ordinance requiring that solid waste processed or handled within the town of Clarkston be processed or handled only at the town's transfer station that was owned and operated by a private contractor. The operation of this ordinance conferred a huge benefit on the favored local operator as it was the only entity that could provide the waste processing service. The Court held that this ordinance denied access to the local market to out-of-state firms who might wish to provide the same waste processing service, and that because of this denial of access, the ordinance ***discriminated*** against interstate commerce.

² These benefits are, of course, that they can deal with regard to all the wines they were selling on September 24, 1996, while out-of-state companies can only sell brands of wine that no one else is already selling in a particular geographic area. This is a huge competitive advantage for wine wholesalers that were licensed on that date.

³ The fact that Plaintiffs have not specifically challenged § 601 is immaterial. It is the effect that § 601 had on the market place on the date § 205(3) was passed that is relevant to this litigation. By requiring that all wine wholesalers have been residents of Michigan for at least one year prior to receiving their license, it was a sure bet that no out-of-state ADA/wine wholesaler would ever obtain the benefits available to every wine wholesaler on the date § 205(3) was passed. Even if § 601 is not itself unconstitutional (Plaintiffs believe it is), the interplay of the two statutes renders § 205(3) facially invalid and unenforceable.

The local ordinance in *Carbone* acts precisely in the same way as § 205(3), as they both result in the denial of access to a local market.⁴ Perhaps the most striking similarity between these two cases is the fact that in *Carbone*, the favored local business was a single business and in the instant case, the favored local businesses are, for all practical purposes, the two in-state ADAs, Transcon and General. In both cases, the defendants argued that the statute did not discriminate against interstate commerce because it also had negative impacts on a number of other *local* businesses, but the Supreme Court made short shrift of this argument. It noted that the fact that there was a limited class of favored local businesses actually "makes the protectionist effect of the ordinance more acute." *Id* at 392. If a flow control ordinance that favors one in-state business is "*per se* invalid", *id*, then clearly § 205(3), which has the same effect of providing a benefit to in-state wine wholesalers that is forever denied to out-of-state wholesalers, must also be declared *per se* invalid.

Neither the Court of Appeals nor the Defendants even mention the *Carbone* case, let alone distinguish it from the case at hand. Yet it is difficult to imagine a case which is more

⁴ Defendants assert that access is not denied to out-of-state ADA/wine wholesalers because they can merge with or buy a local company. The same argument could have been made in *Carbone* as there was nothing stopping an out-of-state waste processor from buying or merging with the local favored waste processor in the town of Clarkston, New York. Obviously, requiring an out-of-state company to buy an in-state company to have access to an in-state market does not alleviate the negative effects that an exclusionary statute imposes on interstate commerce.

Furthermore, the fact that Plaintiffs have access to some of the market in Michigan also does not alleviate these negative effects. The same would have been true in *Carbone*: out-of-state waste processors could have access to all of the rest of the State of New York, but they would never have access to the very limited Clarkstown market. Yet, this was sufficient discrimination for the Supreme Court to declare the local ordinance unconstitutional. Likewise, it is clear that unless the local ADA/wine wholesalers voluntarily give up their rights to sell the wines that they were selling on September 24, 1996, ***no*** out-of-state ADA/wine wholesaler ***will ever have access*** to those wine brands in the geographic areas occupied by the in-state ADA/wine wholesalers. This negative impact on interstate commerce is far greater than that identified in *Carbone*.

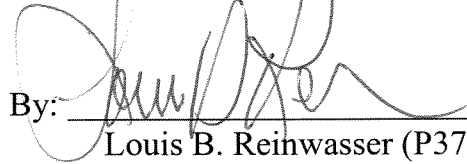
analogous on the issue of discrimination. The rule of *Carbone* requires that strict scrutiny be applied to § 205(3). The failure of the lower courts to do this requires reversal.

CONCLUSION

For the reasons outlined above and in Plaintiffs' Application for Leave to Appeal, Plaintiffs respectfully request that their application be granted.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: 

Louis B. Reinwasser (P37757)

Attorneys for Plaintiffs
One Michigan Avenue, Suite 900
Lansing, MI 48933-1609
(517) 487-2070

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